IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

WHITEHOUSE TRUCKING, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Intervening Defendants Darling Freight, Inc., R. W. Express, Inc., Ringle Express, Inc., Michigan Transportation Co., Severson Transport, Inc., Wenham Transportation, Inc., St. Louis Freight Lines, Inc., B & L Motor Freight, Inc., Graff Trucking Co. Inc., Midwest Emery Freight System, Inc., Sentle Trucking Co., Joyce Trucking Co., Direct Transit Lines, Inc., Melton Truck Lines, Inc., Hennis Freight Lines, Inc. move that the judgment of the district court be affirmed.

STATEMENT

The Appellees herein adopt the United States of America and the Interstate Commerce Commission's statement of facts as presented to this Court in their Motion to Affirm.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The district court correctly held that the Commission's interpretation of the commodity description in the instant certificate was not clearly erroneous or an abuse of discretion. The district court, citing *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 and *Malone Freight Lines, Inc. v. United States*, 107 F. Supp. 946, held:

> The interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law. (J.S. App. A., 2a).

No additional restriction has been imposed upon the Whitehouse certificate as a result of the investigation instituted by the Commission. Rather, under the authority of Sections 204(c) and 212(a) of the Interstate Commerce Act (hereinafter referred to as the Act), 49 U.S.C. Sections 304(c) 49 Stat. 546 and 312(a), 49 Stat. 558, the Commission sought to determine whether Whitehouse, in violation of Section 206(a) of the Act, 49 U.S.C. 306(a), 49 Stat. 551, had been transporting commodities as a common carrier by motor vehicle, not authorized by its certificate

numbers MC-106760 (Sub-Nos. 5, 26, 41, 45 and 46), and especially that portion of its authority held under Sub-No. 45. By interpreting Whitehouse's certificate the Commission did not restrict, modify, alter or revoke any portion of the certificate, but rather clearly indicated what rights Whitehouse had from the beginning. *Malone Freight Lines, Inc. v. United States; supra.*

1. The interpretation of a certificate issued by the Commission is a question solely for that agency, *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171, and, unless such interpretation is clearly erroneous, it is controlling on the courts, *Andrew G. Nelson, Inc. v. United States,* 355 U.S. 554. In proceedings instituted under Section 204(c) and 212(a) of the Act the Commission is the administrative body charged with the interpretation of certificates of its own creation. In *J. B. Action, Inc. v. United States,* 221 F. Supp. 174, the court pointed out the formidable expertise of the Commission in the interpretation of its own certificates. (J.S. App. A). It is the obligation of the court to recognize the Commission's skill and judgment in its field, and as such, it is not for the court to examine the entire record in the case in order to determine whether the court would have arrived at the same conclusion as the Commission did. *Columbia Transportation Co. v. United States,* 167 F. Supp. 5. The district court reiterated this long established principle and found:

> The interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law. We have carefully examined the pleadings, briefs and oral argument of all the parties in this case, as well as the opinion of

> the Commission and cannot say that the findings of the Commission are clearly erroneous. . . . Furthermore, the manner in which the intended use test was applied by the Commission in this case was not an abuse of discretion. (Citations omitted) (J.S. App., A., 2a-3a).

2. Appellant erroneously contends (J.S. 6-7) that the Commission's interpretation, as upheld by the district court, lessened the involved authority by adoption of a subsequently adopted policy. In November, 1962, Appellant purchased the authority involved from Commercial Carriers, Inc. which had at all times limited the scope of its authority to the transportation of prefabricated houses or buildings. The Commission specifically stated:

> As noted previously, the operations conducted by respondent's predecessor predominantly consisted of transportation of prefabricated houses or buildings and some shipments of components of such prefabricated buildings. Clearly, there was no intent that the authority purchased should embrace unrestricted authority to transport all "building material" regardless of their intended use and it fairly appears that the purchase price paid was significantly related only to authority to transport prefabricated houses and buildings and the components necessary for their completion. Compare *Consolidated Copperstate Lines, Inc. v. Navajo Freight*, 92 M.C.C. 516, 519. (J.S. App. B., 16a).

A new commodity description for "building materials" was not issued after Commercial Carriers, Inc., appellant's predecessor, received the certificate in 1947. The Commission in *William McDade Interpretation of Certificate*, 53 M.C.C. 401, construed "building materials" authority granted in 1941. In addition, the Commission's interpretations and distinctions of and between "building materials" and "prefabricated building" authority have been rendered

prior to appellant's purchase of this certificate and said interpretations and distinctions affect all outstanding certificates. See, *Descriptions* in *Motor Carrier Certificates*, 61 M.C.C. 209.

3. Appellant contends that the district court misconstrued the rule established in *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 by placing a restriction on appellant's unambiguous certificate. It is submitted that the *Nelson* case was properly applied inasmuch as the district court upheld the tests applied by the Commission which are no longer open to question. Appellant confuses an "interpretation" of a certificate with a "restriction" of a certificate. The district court upheld the Commission's use of the "intended use" test. (J.S. App. A, 3a).* In applying the "intended use" test, the Commission merely maintained its entrenched practice of distinguishing "building material" authority from "prefabricated houses and buildings" as a restrictive term having a definite meaning in transportation parlance, and that the words employed were to be given their trade or technical meaning. *Interstate Commerce Commission v. Black*, 6 Fed. Car. Cases ¶80,466 (N.D. Ga. 1947), *aff'd.*, 167 F.2d 825 (C.C.A. 5th Cir. 1948).

Further, in *Malone Freight Lines, Inc. v. United States*, *supra*, at 951 the Court stated:

> It is not felt that Title 49 U.S.C.A. Section 312, Interstate Commerce Act, Part II, Section 212, providing for the revocation of a certificate, is applicable, and to apply it would be to assume the Plaintiff's contention of the issue, namely, that the contested operations were authorized by the certificate and revoked by the Commission's order. The

* See also, C & H Transportation Co., Interpretation of Certificates, 62 M.C.C. 587, approving use of the "intended use" test.

Commission's interpretation of the certificate never included the finding that these operations were authorized and thus it could not revoke authority that never existed.

The Commission held that "The terms are used in the context of this Commission's functions and usage of transportation terminology (J.S. App. B., 11a)." Such a finding is not clearly erroneous, capricious, arbitrary or an abuse of discretion and in no way diminishes the authority held by appellant.

CONCLUSION

The district court's decision is clearly correct and no substantial question is presented by this appeal. It is respectfully submitted that the judgment be affirmed.

Respectfully submitted,

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